



## INTERIOR BOARD OF INDIAN APPEALS

Southern Ute Indian Tribe v. Acting Albuquerque Area Director,  
Bureau of Indian Affairs

36 IBIA 28 (02/26/2001)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

SOUTHERN UTE INDIAN TRIBE

v.

ACTING ALBUQUERQUE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 00-25-A

Decided February 26, 2001

Appeal from a decision denying mature contract status to an Indian Self-Determination Act contract.

Reversed.

1. Board of Indian Appeals: Generally--Contracts: Indian Self-Determination and Education Assistance Act: Generally--Indians: Indian Self-Determination and Education Assistance Act: Generally

When an appeal to the Board of Indian Appeals concerns a decision to refuse to allow an Indian tribe to convert an Indian Self-Determination Act contract to mature status under 25 U.S.C. § 450b(h), the Board must determine whether there are any genuine issues of material fact to be resolved before it can determine what appeal procedures will apply to the appeal. 25 C.F.R. § 900.160(a)(1).

2. Contracts: Indian Self-Determination and Education Assistance Act: Generally--Indians: Indian Self-Determination and Education Assistance Act: Generally

Under 25 U.S.C. § 450b(h), a "mature contract" is a self-determination contract which has been continuously operated by a tribal organization for three or more years and for which there are no significant and material audit exceptions in the annual financial audit of the tribal organization.

APPEARANCES: Sam W. Maynes, Esq., Durango, Colorado, and Luke Mulligan, Esq., Ignacio, Colorado, for Appellant; Dori Richards, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Albuquerque, New Mexico, for the Acting Area Director.

## OPINION BY ADMINISTRATIVE JUDGE VOGT

The Southern Ute Indian Tribe (Tribe) appeals from a July 28, 1999, decision issued by the Acting Albuquerque Area Director, Bureau of Indian Affairs (Acting Area Director; BIA), and a November 10, 1999, report of informal conference and recommended decision issued by the Acting Southwest Regional Director, BIA (Acting Regional Director). <sup>1/</sup> In his July 28, 1999, decision, the Acting Area Director declined to grant mature contract status to an Indian Self-Determination Act (ISDA) contract under which the Tribe performs transportation planning activities using so-called 2% planning funds. <sup>2/</sup> In her November 10, 1999, recommended decision, the Acting Regional Director also declined to do so. For the reasons discussed below, the Board reverses the Acting Area Director's decision.

Background

The contract at issue here, Contract CTM40T75018, was awarded in March 1993 for a term beginning September 21, 1992, and ending December 31, 1993. Funds for the contract were derived, at least in part, from the Department of Transportation (DOT). The contract was modified in May 1994, April 1995, January 1998, and September 1998. As a result of these modifications, the contract performance period was extended through September 30, 1999.

By letter dated June 23, 1999, the Tribe requested that the contract be designated a mature contract under 25 C.F.R. § 450b(h). The Acting Area Director denied the request on July 28, 1999, stating:

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<sup>1/</sup> Subsequent to the July 28, 1999, decision but prior to the Nov. 10, 1999, recommended decision, the title of the Albuquerque Area Director was changed to Southwest Regional Director.

The July 28, 1999, decision and the Nov. 10, 1999, recommended decision were signed by two different individuals, both of whom were serving in an "acting" capacity at the time they signed their respective documents. The individual who signed the Nov. 10, 1999, recommended decision was evidently also the "designated representative of the Secretary" required by 25 C.F.R. § 900.155(c).

Although it is not usually necessary to distinguish between different individuals serving in the same position, the Board maintains the distinction in this case. In accordance with 25 C.F.R. § 900.157, the initial decision is considered to be the one on appeal here. Therefore, the Acting Area Director, who issued the initial decision, is identified as the Appellee.

<sup>2/</sup> See further discussion of these funds below.

Two percent (2%) Planning Funds provided under the Transportation Equity Act for the 21st Century (TEA-21) \* \* \* were to assist tribes in developing a long-range transportation plan. The law has four more years before re-authorization is required. You were afforded several contracts, which had specific terms identified within the contract. The contracts provided to you should have stated that these were "TERM" contracts with a specific deliverable to be provided at the end of each term. At no time were these contracts ever meant to be permanent in nature. Once your current contract is completed on September 30, 1999, your contract will be closed. Therefore, we are denying your request for "mature contract status."

By the end of the next four-year period, the 2% Planning Funds will be made available to other tribes within our Area that have not been afforded a contract with the opportunity to put into place a five-year long range transportation plan as well.

On August 23, 1999, the Tribe requested an informal conference under 25 C.F.R. § 900.154. The informal conference was held on October 27, 1999. <sup>3/</sup> On November 10, 1999, the Acting Regional Director issued a report and recommended decision under 25 C.F.R. § 900.156, in which she agreed with the Acting Area Director's decision. She stated:

While we agree that the contract has been operated for more than a three-year period, it was not awarded for that period of time. The initial contract was awarded \* \* \* for a one-year period but was extended at the Tribe's request through September 30, 1999, to complete the original projects specified in that contract. \* \* \*

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<sup>3/</sup> On Sept. 30, 1999, the Tribe accepted under protest BIA's offer of a new contract for "2% Transportation Planning." The new contract has a three-year term beginning Sept. 28, 1998, and ending Sept. 27, 2001.

The Tribe's Sept. 30, 1999, letter stated at page 1:

"By signing the contractual agreement CTM40T75045, it is to be understood by all parties that this contractual agreement (CTM40T75045) is a continuation of the 2% Planning Activities which the Tribe has been performing since September 1992 under Contract CTM40T75018. Also, by signing this contractual agreement for CTM40T75045, it is to be understood that the [Tribe's] request for conversion to mature status will be conveyed to this agreement."

We believe that "mature contract status" should reflect that the Tribe requested and received funding on an annual basis to perform a specific function rather than extending a contract that was meant to be awarded for a one-year period to a period of more than six years.

"Mature contract status" also carries with it the understanding that once reached, that annual funding will be continued. If the annual funding does not follow, the Bureau will be required to issue a "declination." \* \* \*

The 2% Planning funds \* \* \* were distributed to Regional Offices for awarding of contracts to individual tribes for the primary purpose of establishing a five-year planning document. As issued in Fiscal Year 1999, it is the intent of the Southwest Regional Office to establish a policy for Fiscal Year 2000 to allow those tribes that have **not** received 2% Planning funding since the enactment of the Transportation bill to be given first chance to submit a proposal for funding. We believe that the policy will allow **all** tribes within the Southwest Region an opportunity to have a proposal funded to establish a five-year planning document. The policy will **not** preclude any other tribe from submitting a proposal for funding, it will only allow the Regional Director to use discretion in awarding these contracts.

[ISDA] provides that "the Secretary shall not make any contract [which] would impair his ability to discharge his trust responsibilities to any Indian [t]ribe or individuals." (25 U.S.C. § 450j(g)).

Upon the belief that these funds are **discretionary** in the awarding of the funding available, the Regional Director hereby denies the "mature contract status" requested by the [Tribe]. It is believed that the funding is available for "project related activities" with a specific deliverable.

There are no current regulations to guide the Bureau or the Tribes in the distribution, however, we believe that the current negotiations that are on-going may identify an actual distribution within the regulations. \* \* \* Once these regulations have been published in final form, the question of mature status will become moot if a standard is set for establishing the formula for awarding contracts. It is the intent of the Southwest Region to continue to identify these funds as **discretionary** until such time as the regulations are in place.

Acting Regional Director's Nov. 10, 1999, Recommended Decision at 2-4.

Upon receipt of the recommended decision, the Tribe appealed to the Board under 25 C.F.R. § 900.158.

[1] In an order dated December 15, 1999, the Board found that the appeal fell under 25 C.F.R. § 900.150(h) because it pertained to "[a] decision to refuse to allow an Indian tribe \* \* \* to convert a contract to mature status, under [25 U.S.C. § 450b(h)]."

The Board's December 15, 1999, order continued:

25 C.F.R. § 900.160(a)(1) provides: "If the [Board] determines that the appeal \* \* \* falls under § 900.150(h) \* \* \*, and the Indian tribe \* \* \* has requested a hearing, the [Board] will grant the request unless the [Board] determines that there are no genuine issues of material fact to be resolved."

As is evident from this provision, the Board must determine whether there are genuine issues of material fact to be resolved in this appeal before it can determine whether to refer this appeal to the Hearings Division for assignment to an Administrative Law Judge under 25 C.F.R. § 900.161(a) or to retain the appeal and proceed under 25 C.F.R. § 900.160(b).

In its notice of appeal, the Tribe states its position on this point:

As to the issues described [in the notice of appeal], there are no genuine issues of material fact to be resolved and the Tribe is entitled to judgment as a matter of law. Should it be evident from the answer or otherwise that genuine issues of material fact exist, then the Tribe requests a hearing.

Dec. 15, 1999, Order at 1. In the same order, the Board asked the Regional Director to state his position as to whether there were any genuine issues of material fact to be resolved in the appeal. 4/

The Regional Director did not respond. On December 28, 1999, the Board made a determination for purposes of 25 C.F.R. § 900.160(a)(1) that there were no genuine issues of material fact to be resolved in this appeal. Based upon that determination, the Board issued an Order for Administrative Record under 25 C.F.R. § 900.160(b), in which it stated: "In light

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4/ Because prompt Board action is required under 25 C.F.R. § 900.160, the Regional Director was given a short response time. The Board's order was telefaxed to him, and he was authorized to respond by telefax.

of the Regional Director's failure to respond \* \* \*, any genuine issue of material fact which may arise during the course of these proceedings is subject to determination in the Tribe's favor."

### Discussion and Conclusions

Although this appeal arises under ISDA, it also involves provisions of the Transportation Equity Act for the 21st Century (TEA-21), Act of June 29, 1998, Pub. L. No. 105-178, 112 Stat. 107. The provision directly at issue here was originally a part of TEA-21's predecessor, the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240, 105 Stat. 1914. As amended by TEA-21, the provision is codified at 23 U.S.C. § 204(j). <sup>5/</sup> It provides:

Indian Reservation Roads Planning. - Up to 2 percent of funds made available for Indian reservation roads for each fiscal year shall be allocated to those Indian tribal governments applying for transportation planning pursuant to the provisions of [ISDA]. The Indian tribal government, in cooperation with the Secretary of the Interior, and as appropriate, with a State, local government, or metropolitan planning organization, shall carry out a transportation planning process in accordance with subsection (a). <sup>[6/]</sup> Projects shall be selected by the Indian tribal government from the transportation improvement program and

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<sup>5/</sup> The provision was included in § 1032(b)(4) of ISTEA, 105 Stat. at 1974, and was amended by § 1115(d)(6) of TEA-21, 112 Stat. at 157.

<sup>6/</sup> 23 U.S.C. § 204(a) provides in part:

"(1) In general. - Recognizing the need for all Federal roads that are public roads to be treated under uniform policies similar to the policies that apply to Federal-aid highways, there is established a coordinated Federal lands highways program that shall apply to public lands highways, park roads and parkways, and Indian reservation roads and bridges.

"(2) Transportation planning procedures. - In consultation with the Secretary of each appropriate Federal land management agency, the Secretary [of Transportation] shall develop, by rule, transportation planning procedures that are consistent with the metropolitan and statewide planning processes required under sections 134 and 135.

"(3) Approval of transportation improvement program. - The transportation improvement program developed as a part of the transportation planning process under this section shall be approved by the Secretary [of Transportation]."

shall be subject to the approval of the Secretary of the Interior and the Secretary [of Transportation]. 7/

[2] The provision of ISDA at issue here is the definition of "mature contract" in 25 U.S.C. § 450b(h). That definition states:

"[M]ature contract" means a self-determination contract that has been continuously operated by a tribal organization for three or more years, and for which there are no significant and material audit exceptions in the annual financial audit of the tribal organization: Provided, That upon the request of a tribal organization or the tribal organization's Indian tribe for purposes of section 450f(a) of this title, a contract of the tribal organization which meets this definition shall be considered to be a mature contract.

Under this definition, the Tribe contends, its contract qualifies for "mature contract" status. It cites Tohatchi Special Education and Training Center v. Navajo Area Director, 25 IBIA 259 (1994), in support of that contention. The Tribe also contends that the Acting Area Director erred (1) in relying on an unpublished rule (i.e., a prospective policy for distributing transportation planning funds within the Albuquerque Area/Southwest Region) as a basis for denial of mature contract status; (2) in describing the nature and purposes of the planning funds at issue; and (3) in characterizing the Tribe's contract as a term contract lacking provisions for ongoing planning activities.

In his answer brief, the Acting Area Director contends that the decision here is controlled by the provisions of TEA-21, rather than the provisions of ISDA. He argues that "mature contract" status for the Tribe's contract would be inconsistent with TEA-21 because (1) TEA-21 authorizes funding only through fiscal year 2003; (2) distribution of TEA-21 2% planning funds is within the discretion of BIA; (3) ISDA contracts using 2% planning funds must be awarded on a competitive basis; and (4) these contracts may be awarded only for non-recurring projects of limited duration. Further, he contends that the Tribe's contract was for a specific project only, i.e., preparation of a 20-year transportation plan, and did not include any ongoing planning activities.

In its reply brief, the Tribe counters with its own interpretation of the TEA-21 provisions and expresses strong disagreement with all of the Regional Director's contentions.

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7/ The Indian Reservation Roads (IRR) program, of which these planning activities are a part, is administered jointly by BIA and the Federal Highway Administration (FHWA), a component of DOT.



Although a number of arguments have been made here, the central issue is not a complicated one. With respect to the designation of contracts as mature, the Board stated in Tohatchi:

The statutory language and the legislative history indicate that the designation of a contract as mature was intended to be a relatively simple and straightforward decision. As is clear from the definition in 25 U.S.C. § 450b(h), only two findings are required--(1) that the contract has been continuously operated by a tribal organization for 3 or more years and (2) that there are no significant and material audit exceptions in the annual financial audit of the tribal organization.

25 IBIA at 265.

There is no dispute that the Tribe's contract satisfies these two criteria.

25 U.S.C. § 450b(h) does not, on its face, allow for any exceptions to the requirement that a contract be considered mature if it satisfies the statutory criteria. Nor does the provision's legislative history suggest the possibility of exceptions. See the discussion of legislative history in Tohatchi, 25 IBIA at 264-65.

The Acting Area Director seems to be contending, not only that the provisions of TEA-21 control here, but also that there is a conflict between TEA-21 and ISDA which would, despite the provisions of 25 U.S.C. § 450b(h), preclude mature contract status for any ISDA contract funded with TEA-21 2% planning funds.

As the Tribe points out, the Acting Area Director's view on this point is inconsistent with the document titled "Indian Reservation Roads Program: Transportation Planning Procedures and Guidelines" (TPPG), issued by the FHWA in October 1999. <sup>8/</sup> This document, which notes the participation of a number of BIA representatives in its development, states in its preface:

This document represents a combined effort to define the transportation planning function under the IRR Program. The document explicitly states what is suggested and thought to be guidance for Indian Tribal Governments and what is a procedural requirement of the law consistent with 23 U.S.C. Section 204(j) "Indian Reservation Roads Planning," and [ISDA]. It also

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<sup>8/</sup> This document may be found at the FHWA website:  
<http://www.fhwa.dot.gov/flh/reports/indian/intro.htm>.

addresses previously unclear policies related to funding issues and eligible activities. The roles and responsibilities of whether the transportation planning function is performed by the BIA or Indian Tribal Governments under Self-Governance compacts or Self-Determination contracts are defined.

In Chapter 2, "Transportation Planning Funding," the TPPG states:

Indian Tribal Governments with transportation planning contracts that are mature may request direct transfer of funds from the Secretary of [the] Interior. ***Upon the Secretary of the Interior's receipt of funding, the Indian Tribal Governments with direct transfer are authorized to carry out transportation planning activities utilizing IRR transportation planning funds. The Secretary of the Interior shall directly transfer the tribes' share of IRR transportation planning funds within 10 days of receipt.***

This paragraph clearly recognizes the possibility that transportation planning contracts may be mature. The TPPG indicates that it had been reviewed by BIA officials, who evidently did not object to the paragraph. The Board concludes that BIA has recognized the possibility that ISDA transportation planning contracts may achieve mature contract status.

One of the Acting Area Director's concerns is that the 2% planning funds, which come from DOT, may not always be available. As the Tribe argues, however, funding for all ISDA contracts, not just those funded by DOT, is subject to the availability of appropriations. <sup>9/</sup> Further, as the Tribe also argues, contract funding is not at issue in this appeal.

The Acting Area Director's contention that he has discretion in allocating the 2% planning funds is evidently driven by his concern that tribes which have not previously received

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<sup>9/</sup> See 25 U.S.C. § 450j(c)(1):

"A self-determination contract shall be))

"(A) for a term not to exceed three years in the case of other than a mature contract, unless the appropriate Secretary and the tribe agree that a longer term would be advisable, and

"(B) for a definite or an indefinite term, as requested by the tribe \* \* \* in the case of a mature contract.

"The amounts of such contracts shall be subject to the availability of appropriations."

See also the final paragraph of 25 U.S.C. § 450j-1(b):

"Notwithstanding any other provision in [ISDA], the provision of funds under [ISDA] is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under [ISDA]."

such funds be permitted to share in them. He contends that, "[e]ven where the proposed contract application is complete and viable, the Secretary may decline a contract if the tribe has already had an opportunity to access funds and provide transportation planning, to allow other tribes to perform the same functions." Answer Brief at 8.

TEA-21 sets out specific requirements for the allocation of funds appropriated for Indian reservation roads, including the 2% planning funds. 23 U.S.C. § 202(d) provides:

(1) For fiscal years ending before October 1, 1999.) On October 1 of each fiscal year ending before October 1, 1999, the Secretary [of Transportation] shall allocate the sums authorized to be appropriated for such fiscal year for Indian reservation roads according to the relative needs of the various reservations as jointly identified by the Secretary [of Transportation] and the Secretary of the Interior.

(2) Fiscal year 2000 and thereafter.)

(A) In general.) All funds authorized to be appropriated for Indian reservation roads shall be allocated among Indian tribes for fiscal year 2000 and each subsequent fiscal year in accordance with a formula established by the Secretary of the Interior under a negotiated rulemaking procedure under subchapter III of chapter 5 of title 5.

In January 1993, the Deputy Commissioner of Indian Affairs approved a Relative Need Formula for allocation of funds appropriated to DOT for Indian reservation roads. <sup>10/</sup> That formula, with some modifications, has been used ever since.

A Negotiated Rulemaking Committee was formed pursuant to the mandate of TEA-21. Although permanent rules have yet to be published, the Committee has approved the publication of three temporary rules for fiscal years 2000 and 2001. The most recent temporary rule was published on January 9, 2001. It is effective from January 9, 2001, through September 30, 2001, and adds the following provision to 25 C.F.R. Part 170:

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<sup>10/</sup> Preparation of the formula was undertaken pursuant to sec. 126 of the Surface Transportation Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097, 2113, which included a provision substantially identical to present 23 U.S.C. § 202(d)(1).

The current Relative Need Formula may be found on BIA's IRR website:  
[http://www.irr.bia.gov/LEVEL2\\_HOME\\_BIADOT/IRR\\_RELATIVE\\_NEED\\_FORMULA/Relative\\_need\\_formula.htm](http://www.irr.bia.gov/LEVEL2_HOME_BIADOT/IRR_RELATIVE_NEED_FORMULA/Relative_need_formula.htm).

§ 170.4b What formula will BIA use to distribute 75 percent of fiscal year 2001 Indian Reservation Roads funds?

On January 9, 2001 we will distribute 75 percent of fiscal year 2001 IRR program funds authorized under Section 1115 of [TEA-21]. We will distribute the funds to Indian Reservation Roads projects on or near Indian reservations using the relative need formula established and approved in January 1993. The formula has been modified to account for non-reporting states by inserting the latest data reported for those states for use in the relative need formula process. In addition, we are reserving \$19.53 million of this distribution to allow federally recognized tribes to apply for \$35,000 for administrative capacity building for fiscal year 2001.

66 Fed. Reg. 1576, 1580 (Jan. 9, 2001). 11/

Although no specific mention of the 2% planning funds is made in temporary 25 C.F.R. § 170.4(b), the preamble includes a diagram which identifies those funds as a component of the distribution formula and states that they are to be "[d]istribute[d] as 2% of each Tribe's allocation." Id. at 1578.

The temporary rule controls distribution of 2% planning funds for fiscal year 2001. The preamble to the temporary rule indicates that a permanent formula is expected to be in place by the time fiscal year 2002 funds are distributed. Id. at 1577. In the event that goal is not met, a further temporary rule will undoubtedly be published. Thus, distribution of 2% planning funds will continue to be controlled by regulation.

Nothing in TEA-21, the present Relative Need Formula, or the January 9, 2001, Federal Register publication indicates that allocation of 2% planning funds is to be made on a discretionary basis. Nor does anything in those authorities indicate that ISDA contracts using 2% planning funds are to awarded on a competitive basis or that they may be awarded

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11/ The two temporary rules for fiscal year 2000 were published at 65 Fed. Reg. 7431 (Feb. 15, 2000), and 65 Fed. Reg. 37697 (June 16, 2000).

only for non-recurring projects of limited duration. 12/ The Board therefore rejects these three contentions made by the Acting Area Director.

As noted above, the Acting Area Director also contends that the Tribe's contract did not include any ongoing planning activities. The Tribe concedes that the contract called for a specific deliverable)) the 20-year transportation plan)) but contends that it also includes ongoing activities.

It is not clear from the language of the original contract that the intent in 1993 was to include ongoing activities. However, the first modification to the contract, signed by the BIA Contracting Officer on May 18, 1994, and by the Tribal Chairman on May 24, 1994, is titled "Update Tribal Transportation Plan." 13/ The Tribe states that it submitted its 20-year plan in 1994 and, in support of that statement, furnishes a May 18, 1994, memorandum from a BIA Supervisory Contract Specialist to the Area Roads Manager which notes receipt of "what appears to be a final Transportation Plan."

The May 18, 1994, memorandum indicates that, as of that date, BIA had not yet determined whether to accept the plan or to require "corrective action" from the Tribe. Because there had been no determination to require corrective action on the already-submitted plan, the "update" referred to in the contract modification signed by BIA on the same date must have referred to something other than corrective action (such as might have been required to make the original plan acceptable to BIA). The Board concludes that, by authorizing an update under these circumstances, BIA implicitly recognized that ongoing planning activities were to be a part of the contract. The three subsequent contract modifications, which further extended the contract term, lend support to that conclusion. 14/

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12/ In response to the Acting Area Director's contention that transportation planning under TEA-21 is a non-recurring project, rather than a continuing process, the Tribe notes that 23 U.S.C. § 204(j) requires tribes to "carry out a transportation planning process in accordance with [25 U.S.C. § 204(a)]," and that § 204(a), in turn, refers to 23 U.S.C. §§ 134 and 135, both of which state that the process for developing a transportation plan "shall be continuing." 23 U.S.C. §§ 134(a)(4), 135(a)(4).

13/ The wording suggests that the original contract bore that title, but it did not.

14/ The Acting Area Director contends that the Tribe has still not delivered the 20-year plan required by the contract. Although the May 18, 1994, memorandum indicates that the Tribe did submit a plan, it is possible that the Acting Area Director means to argue that the Tribe has not submitted a plan which BIA has found acceptable.

In the end, the Board returns to the definition of "mature contract" in ISDA. As stated above, the Tribe's contract clearly falls within that definition. The Acting Area Director's arguments for disregarding the definition in this case are not persuasive. The Board finds that he erred in declining to recognize the Tribe's contract as a mature contract.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Acting Area Director's July 28, 1999, decision and the Acting Regional Director's November 10, 1999, recommended decision are reversed. The Tribe's transportation planning contract shall be deemed a mature contract.

//original signed

Anita Vogt  
Administrative Judge

I concur:

//original signed

Kathryn A. Lynn  
Chief Administrative Judge

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fn. 14 (continued)

There is clearly a factual dispute here. To the extent the dispute involves a genuine issue of material fact, it is subject to the caveat in the Board's Dec. 28, 1999, order, quoted above.

In any event, the Acting Area Director's contention in this regard does not help his cause here. If BIA truly considered the Tribe's contract to be for a single product only)) the 20-year plan)) and the Tribe failed to deliver that product, BIA presumably should have invoked contractual remedies against the Tribe. In failing to do so, BIA may be considered to have acquiesced in the Tribe's interpretation of the contract as including ongoing planning activities.